

**United States Department of Labor
Employees' Compensation Appeals Board**

R.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

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**Docket No. 14-539
Issued: June 24, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 8, 2014 appellant filed a timely appeal from a November 26, 2013 merit decision of the Office of Workers' Compensation Programs' (OWCP) overpayment decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$3,776.54 overpayment of compensation for the period August 13 to September 21, 2013; and (2) whether he was at fault in the creation of the \$3,776.54 overpayment and, therefore, ineligible for waiver of recovery.

FACTUAL HISTORY

On July 18, 2012 appellant, then a 43-year-old city carrier, sustained an injury when he tripped over a tree root. OWCP accepted the claim for contusion of the left foot, left plantar

¹ 5 U.S.C. § 8101 *et seq.*

fibromatosis, left tenosynovitis of the foot and ankle and a left calcaneal spur. Appellant stopped work on August 29, 2012 and received wage-loss compensation for total disability. He was placed on the periodic rolls.²

By letter dated November 8, 2012, OWCP advised appellant that he had been placed on periodic rolls and outlined his entitlement to compensation benefits and his responsibility to return to work in connection with the accepted injury. Appellant's weekly pay rate was calculated at \$1,049.79. In an attached Form EN1049, OWCP notified him that in order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period return the payment to this office, even if you have already advised OWCP that you are working. Otherwise, an overpayment of compensation may result.

On September 30, 2013 the employing establishment notified OWCP that appellant had returned to full-time light-duty work on August 13, 2013.

By letter dated October 8, 2013, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,776.54 from August 13 through September 21, 2013 because he received wage-loss compensation after his return to full-time work at regular salary. It noted that he was on periodic rolls and received net compensation every 28 calendar days in the amount of \$2,643.58, which he received for the periods July 28 through August 24, 2013 and August 25 through September 21, 2013. OWCP found that appellant improperly received wage-loss compensation through September 21, 2013 because he returned to full-time work on August 13, 2013, a period of 40 calendar days. Appellant's \$2,643.58 net compensation was divided by the 28-calendar-day payment period totaling \$94.4135 received daily. The daily rate was multiplied by the 40 calendar days for which he was overpaid resulting in an overpayment of \$3,776.54. OWCP found that appellant received an overpayment of \$3,776.54 in wage-loss compensation while he had no loss of wages. It further found that he was at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known to be incorrect after returning to work at full salary. OWCP informed appellant of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting documentation.

On October 11, 2013 appellant contested the overpayment, the finding of fault and requested a telephone conference before OWCP. He disagreed that an overpayment occurred, disputed the amount of overpayment or that he was at fault in the creation of the overpayment. Appellant acknowledged that he returned to work on August 13, 2013 and argued that he notified all departments involved. He relied on OWCP to make the proper changes once he returned to work. Appellant stated that he should be entitled to his wage-loss compensation prior to returning to work for the period July 28 to August 13, 2013. He further disputed that he was overpaid for 40 calendar days and argued that he had days off between August 13 and September 21, 2013. Appellant submitted an October 12, 2013 overpayment questionnaire, which noted total monthly income of \$4,758.16 and total monthly expenses of \$4,754.95.

² The Board notes that appellant received his OWCP compensation benefit payments by paper check on a recurring basis.

By decision dated November 26, 2013, OWCP finalized the overpayment in the amount of \$3,776.54 from August 13 through September 21, 2013 because appellant received disability compensation after his return to full-time work at regular salary. It found that he was at fault in the creation of the overpayment and directed recovery in the full amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ OWCP's regulations state in pertinent part: Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁵ A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,776.54 from August 13 through September 21, 2013. On August 29, 2012 appellant was placed on periodic rolls and received wage-loss compensation for total disability. The record establishes that he returned to work full time, eight hours per day, at the employing establishment on August 13, 2013 at his regular salary. Appellant continued to receive wage-loss compensation for total disability through September 21, 2013. As noted, he is not entitled to receive compensation for total disability after he has returned to work and earned his regular salary.⁷ Accordingly, the Board finds that appellant received an overpayment of compensation.⁸

OWCP determined that from August 13 to September 21, 2013 appellant received \$3,776.54 in total net compensation but was not entitled to any compensation during this period. It properly explained that his 28-day net disability compensation amounted to \$2,643.58, the equivalent of receiving \$94.4135 daily. Appellant received wage-loss compensation from

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ *B.H.*, Docket No. 09-292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ *Supra* note 4 and 5. *See also M.A.*, Docket No. 13-2137 (issued March 11, 2014).

⁸ *R.W.*, Docket No. 13-1108 (issued September 10, 2013).

August 13 to September 21, 2013, a period of 40 days. OWCP multiplied the daily compensation rate of \$94.4135 by 40 calendar days to establish an overpayment in the amount of \$3,776.54.

On appeal, appellant asserts that the amount of the overpayment was incorrect as he did not work 40 full calendar days from August 13 to September 21, 2013. This assertion is without merit as the record reflects that he was on the periodic compensation rolls at the time in question.⁹ Periodic rolls compensation payments are made on a calendar-day basis for which OWCP's procedures provide that the claimant receives pay for everyday of the week during the period of disability, at the rate of one-seventh of the weekly compensation rate for each day.¹⁰ Appellant further argued that he was entitled to wage-loss compensation for the period prior to his return-to-work date on August 13, 2013. The Board notes that he was properly paid wage-loss compensation from June 28 to August 12, 2013. The \$3,776.54 overpayment encompasses the period August 13 to September 21, 2013.

OWCP properly explained how the overpayment occurred and provided this information to appellant with the preliminary notice of overpayment. There is no evidence that the overpayment did not occur as found by OWCP. The Board finds that OWCP properly determined that he received an overpayment of compensation in the amount of \$3,776.54 from August 13 through September 21, 2013 for working with no loss of wages.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹¹ provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.¹³ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁴

On the issue of fault, section 10.433 of OWCP's regulations, provide that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.8(b) (February 2013).

¹¹ 5 U.S.C. § 8129(b).

¹² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹³ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁴ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”¹⁵

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.¹⁶

Section 10.430(a) of OWCP’s regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check, which states the period for which payment is being made. Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.¹⁷

ANALYSIS -- ISSUE 2

OWCP applied the third standard and determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. To establish that appellant was at fault in creating the overpayment of compensation, OWCP must establish that, at the time he accepted the compensation checks in question, he knew or should have known the payments were incorrect.¹⁸

As noted, OWCP erroneously issued wage-loss compensation for total disability for the period of August 13 to September 21, 2013. Appellant was not entitled to disability compensation for this period as he had returned to work at full salary. Even if the overpayment resulted from negligence on the part of OWCP, this does not excuse him from accepting payments which he knew or should have known to be incorrect.¹⁹ On November 8, 2012 OWCP advised appellant: In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period return the payment to this office, even if you have already advised OWCP that you are working. Otherwise, an overpayment of compensation may result.

In response to the preliminary overpayment notice, appellant stated that he notified all departments involved and relied on OWCP to make the proper changes once he returned to work. He advised that it would be a hardship for him to repay the overpayment. The Board notes that OWCP includes on each periodic check a clear listing of the period for which payment is being

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.433(b).

¹⁷ *J.R.*, Docket No. 08-1107 (issued June 15, 2009). 20 C.F.R. § 10.430.

¹⁸ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁹ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

made. OWCP places the recipient on notice that a payment was made and the amount of the payment.²⁰ This, together with the strongly worded November 8, 2012 OWCP letter, establishes that appellant should have known that he was not entitled to accept wage-loss compensation for total disability for any period after he returned to work.²¹

For these reasons, OWCP properly found that appellant accepted wage-loss compensation from August 13 to September 21, 2013, which he knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$3,776.54 overpayment of compensation may not be waived.²²

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,776.54 for the period August 13 through September 21, 2013. The Board further finds that he was at fault in creating the overpayment.

²⁰ See *J.R.*, *supra* note 17.

²¹ *R.W.*, Docket No. 13-1285 (issued November 13, 2013).

²² On appeal, appellant argued that his finances prevented him from repaying the overpayment, but the method of recovery of the overpayment is not within the Board's jurisdiction. *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441. With respect to recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *L.D.*, Docket No. 08-678 (issued August 7, 2008).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board